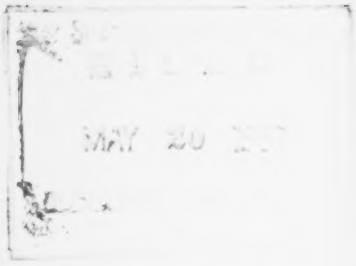
87-213

NO. _____



IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY KINCHELOE,

Petitioner/Appellant,

v.

MARK HAYES,

Respondent/Appellant.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM H. GRIFFIES
Pierce County
Prosecuting Attorney
Counsel of Record

CHRIS QUINN-BRINTNALL
Senior Appellate Deputy

Attorneys for Petitioner

946 County-City Building
Tacoma, Washington 98402
(206)591-7400

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY KINCHELOE,

Petitioner/Appellant,

v.

MARK HAYES,

Respondent/Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM H. GRIFFIES
Pierce County
Prosecuting Attorney
Counsel of Record

CHRIS QUINN-BRINTNALL
Senior Appellate Deputy

Attorneys for Petitioner

946 County-City Building
Tacoma, Washington 98402
(206)591-7400

QUESTIONS PRESENTED

1. Where defendant's federal habeas claim is in a substantially different posture than when raised in the state courts, do the state courts have an opportunity to rule, e.g. Sampson v. Love, No. 85-5178 (6th Cir. 1-24, 1986), or does the federal court of appeals review state court findings and conclusions ignoring the related matter de novo? Hayes v. Kincheloe, No. 85-3681 (9th Cir. 3-19, 1986)?

2. Are all material allegations made in a defendant's petition for writ of habeas corpus to be accepted as true and construed in a light most favorable to the petitioner and against the validity of the plea-based state conviction?

RELIEF SOUGHT

Vacation of the opinion of the United States Court of Appeals for the Ninth Circuit and remand to the Supreme Court of the State of Washington with directions that the defendant's conviction be reinstated. In the alternative, the State of Washington should be required to hold an evidentiary hearing pursuant to RAP 16.11(b) and 16.12 to demonstrate the full facts and circumstances surrounding the defendant's plea.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner: Larry Kincheloe, State of Washington through Pierce County Prosecuting Attorney William H. Griffies, and his deputy, Chris Quinn-Brintnall

Respondent: Mark Hayes, through his counsel Thomas W. Hillier II, Federal Public Defender, 1111 Third Avenue, Room 380, Seattle, Washington 98101, (206)442-1100.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 19, 1986. Mandate terminating review was issued on April 10, 1986.

Jurisdiction is conferred on this court by 28 U.S.C. § 1254(1).

Jurisdiction was invoked at the federal district court level under 28 U.S.C. § 2254.

TABLE OF CONTENTS

OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 9

REASONS FOR GRANTING PETITION 12

1. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED BY PURPORTING TO REVIEW DE NOVO AN ISSUE SUBSTANTIALLY DIFFERENT THAN THAT PRESENTED TO THE STATE COURT. AND AS A RESULT OF ITS APPELLATE POSTURE, MADE FACTUAL AND LEGAL ERRORS REQUIRING VACATION OF THEIR OPINION AND REMAND TO THE STATE COURT FOR AN OPPORTUNITY TO RULE ON THE ISSUE AS POSTURED BY THE FEDERAL MAGISTRATE 13

a. The Defendant Hayes Was Out of Earshot (Ninth Circuit Opinion, p.1) . . . 15

b. The Defendant Hayes Was Not Informed and Did Not Understand the Fine Distinction Between Legal Terms of Art "Premeditated" and "Intentional". . 16

2. THE MAGISTRATE, DISTRICT COURT JUDGE, AND COURT OF APPEALS ERRED WHEN THEY ACCEPTED AS TRUE ALL MATERIAL ALLEGATIONS MADE IN DEFENDANT'S PETITION AND THEREBY PRESUMED THE INVALIDITY OF THE PLEA-BASED STATE CONVICTION . 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Crawford v. Common Pleas Court of Lucas County, 269 Fed.2d 838 (6th Cir. 1959). . 14

Donovan v. Delgato, 339 F.Supp. 446 (D.C. Puerto Rico 1979) 15

Eagle v. Isaac, 456 U.S. 107 (1982) 14

Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 103 (1976) 12,13, 18

Marshall v. Lonberger, 459 U.S. 422, 74 L.Ed.2d 646, 654-658, 103 S.Ct. 843 (1983) . .12,13, 15,17

North Carolina v. Alford, 400 U.S. 25 (1970) 20

Picard v. Connor, 404 U.S. 270 (1971) 14,18

Sampson v. Love, No. 85-5178 ___ F.2d ___ (6th Cir., 1986) . .12,14

Sumner v. Mata, 449 U.S. 539 (1981) 19

Constitutional Provisions

U.S. Const. Amend. XIV 2

U.S. Const. Amend. [VI.] 2

Statutes and Rules

RAP 16.11 3

RAP 16.12 5

RCW 9A.32.030(1)(a) 7

RCW 9A.32.050(1)(a) 7,8

CrR 4.2(f) 7

Other Authorities

28 U.S.C. 2254(b) and (c) 13, 17

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Hayes v. Kincheloe is reported at _____, and is reproduced in its entirety in Appendix "A."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend XIV:

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. [VI.]:

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy

and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RULES OF APPELLATE PROCEDURE 16.11

PERSONAL RESTRAINT PETITION--CONSIDERATION OF PETITION:

(a) Generally. The Chief Judge will consider the petition promptly after the time has expired to file petitioner's reply brief. The Chief Judge determines at the initial consideration if the petition will be retained by the appellate court for determination on the merits or transferred to a superior court for determination on the merits or for a

reference hearing.

(b) Determination by Appellate Court. The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.

(c) Oral Argument. Decisions of the Chief Judge will be made without oral argument. If a petition is to be decided on the merits by a panel of judges, the appellate court clerk will set the

petition for consideration by the panel of judges, with or without oral argument. If oral argument is directed, the clerk will notify the parties of the date set for oral argument.

RULES ON APPELLATE PROCEDURE 16.12

PERSONAL RESTRAINT PETITION -- SUPERIOR COURT HEARING:

If the appellate court transfers the petition to a superior court, the transfer will be to the superior court for the county in which the decision was made resulting in the restraint of petitioner or, if petitioner is not being restrained on the basis of a decision, in the superior court in the county in which petitioner is located. If the respondent is represented by the attorney general, the prosecuting attorney, or a municipal attorney, respondent must take steps to obtain a prompt evidentiary hearing and must serve notice of the date set for

hearing on all other parties. The parties, on motion and for good cause shown, will be granted reasonable pretrial discovery. Each party has the right to subpoena witnesses. The hearing shall be held before a judge who was not involved in the challenged proceeding. The petitioner has the right to be present at the hearing and the right to cross-examine adverse witnesses. The rules of evidence apply at the hearing. Upon the conclusion of the hearing, if the case has been transferred for a reference hearing the superior court shall enter findings of fact and have the findings and all appellate court files forwarded to the appellate court. Upon the conclusion of the hearing if the case has been transferred for a determination on the merits, the superior court shall enter findings of fact and conclusions of law and an order deciding the petition.

CRIMINAL RULES 4.2(f):

Withdrawal of Plea. The court shall allow a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.

RCW 9A.32.030(1)(a):

Murder in the first degree. (1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he causes the death of such person or of a third person; or

. . . .

RCW 9A.32.050(1)(a):

Murder in the second degree. (1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; or

. . . .

STATEMENT OF THE CASE

On the evening of January 24, 1980, Hayes shot and killed Larry Jackson and Audrey Ellis outside a bar in Tacoma, Washington. Hayes subsequently admitted shooting the victims, but claimed the shootings were unintentional. The evidence belied the defendant's claimed lack of intent. Larry Jackson died instantly from multiple gunshot wounds. Likewise, Audrey Ellis died from multiple gunshot wounds to the head and face while lying on the ground. (ER 103-104; 122-135). Defense counsel, John O'Connell, described Ms. Ellis' death as execution style. (ER 140,141). Mr. O'Connell was an attorney in private practice in Tacoma, Washington, a former Pierce County Prosecuting Attorney and former Attorney General of the State of

Washington. (ER 139). He was privately retained.

Mr. Hayes was originally charged with two counts of Murder in the First Degree. (ER 49). He was arraigned on January 25, 1980, and entered pleas of not guilty to those charges. On April 3, 1980, he pled guilty to the charges specified in the amended information. (ER 101-116). He was sentenced on June 5, 1980, to two (2) life terms. (ER 117-135). On December 12, 1980, the Washington State Board of Prison Terms and Paroles set Hayes' minimum term at twenty (20) years on each count to run concurrently.

A co-defendant, Terrell Campbell, pled guilty to two counts of manslaughter in the first degree.

Defendant sought review of his conviction in Pierce County by way of a personal restraint petition in Division

II of the state Court of Appeals. (Appendix "B"). The petition was also reviewed by the Washington Supreme Court.

The defendant's contention in his personal restraint petition was that the court had a duty to affirmatively advise him of the elements of the crimes charged and that there was no factual basis for his plea. In his testimony before Magistrate Burgess in federal court, the defendant acknowledged receiving and reading a copy of the amended information which advised him of the element of intent.

However, the defendant's claim in federal court (as phrased by the magistrate) was <u>not</u> that the defendant had not been informed, but that he had not understood. Thus, the defendant's claim was in a substantially different position in federal court than in state court.

REASONS FOR GRANTING PETITION

Rule 17 provides that review by a petition for writ of certiorari will be granted only when there are special and important reasons for doing so. The opinion of the Ninth Circuit Court of Appeals in the instant case is contrary to longstanding law of this court, Henderson v. Morgan, 426 U.S. 637 (1976); Marshall v. Lonberger, 459 U.S. 422, (1983), in conflict with the recent decisions of other courts of appeals in the nation, Sampson v. Love, No. 85-5178 ___ F.2d ___ (6th Cir., 1986), eradicates the sovereignty of state courts, and undermines the decisions of lower federal courts by allowing the appellate court to review de novo at will.

Essentially, the Ninth Circuit's decision in this case applies Federal Rule 11 requirements that the court

inform the defendant on the record of the elements of the crime against him and eliminates the presumption that a sophisticated, counselled defendant who has received and read a copy of the information is thereby informed of the elements. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); Marshall v. Lonberger, 459 U.S. 422; 74 L.Ed.2d 646, 654-658, 103 S.Ct. 843 (1983).

1. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED BY PURPORTING TO REVIEW DE NOVO AN ISSUE SUBSTANTIALLY DIFFERENT THAT THAT PRESENTED TO THE STATE COURT. AND AS A RESULT OF ITS APPELLATE POSTURE, MADE FACTUAL AND LEGAL ERRORS REQUIRING VACATION OF THEIR OPINION AND REMAND TO THE STATE COURT FOR AN OPPORTUNITY TO RULE ON THE ISSUE AS POSTURED BY THE FEDERAL MAGISTRATE.

The court in the instant case erred when it held the following:

The exhaustion of state remedies requirements of 28 U.S.C. 2254(b) and (c)

are merely matters of comity which may be ignored by the federal court. See Engle v. Isaac, 456 U.S. 107 (1982) (state contemporaneous objection ruled bars federal review); Picard v. Connor, 404 U.S. 270 (1971) (substance of petitioner's claim must be fair before the state court before remedy exhausted; court held to have erred in finding exhaustion, the matter remanded to state court); accord, Sampson v. Love, No. 85-5178 (6th Cir. Jan. 24, 1986);

The court of appeals without notice to the parties before it would review a district court's determination as to voluntariness of a guilty plea de novo. See, Crawford v. Common Pleas Court of Lucas County, 269 Fed.2d 838 (6th Cir. 1959) (the court of appeals had no jurisdiction to entertain a petition for habeas corpus); see also, Donovan v. Delgato, 339 F.Supp. 446 (D.C. Puerto

Rico 1971) (federal habeas corpus relief should be sparingly granted). Marshall v. Lonberger, 459 U.S. 431-433.

As a result of the de novo review, the Ninth Circuit Court of Appeals made several glaring errors in their factual determinations as follows:

a. The Defendant Hayes Was out of Earshot. (Ninth Circuit Opinion, p. 1).

It is inappropriate for a federal or appellate court to base a ruling on an incorrect assumption regarding the acoustics of a state court and the physical positions of the defendant and parties before the bench.

b. The Defendant Hayes Was Not Informed and Did Not Understand the Fine Distinction Between Legal Terms of Art "Premeditated" and "Intentional."

Mr. Hayes was fully literate having completed at that time 11 years in school

and 2 1/2 years in the Marines. He was described by his counsel, former Attorney General for the State of Washington, as one of the more intelligent clients he had had. On February 22, 1976, Mr. Hayes was charged under Missouri law with murder in the first degree and assault with intent to kill. He stood trial and was acquitted. Mr. Hayes acknowledged receiving and reading the amended information in the instant case charging him with murder in the second degree, which clearly sets out the term "intent" is an element of the crime. Hayes' defense counsel testified that he had discussed the fact of the difference between murder in the first degree and murder in the second degree as not being premeditated with his client on one or more of the 12 to 15 meetings he had with

him before entry of his plea. Premeditation is the only element not present in murder in the second degree which is present in murder in the first degree.

2. THE MAGISTRATE, DISTRICT COURT JUDGE, AND COURT OF APPEALS ERRED WHEN THEY ACCEPTED AS TRUE ALL MATERIAL ALLEGATIONS MADE IN DEFENDANT'S PETITION AND THEREBY PRESUMED THE INVALIDITY OF THE PLEA-BASED STATE CONVICTION.

In Marshall v. Lonberger, 459 U.S. 422 (1983), this court found that the Court of Appeals for the Sixth Circuit erroneously applied the fairly supported by the record standard enunciated in 28 U.S.C. §§ 2254(d). This court went on to hold that the appellate court's reliance on petitioner's testimony and the fact that the state produced no contrary testimony were insufficient to set aside the state findings. This court also noted that the federal court must presume

that the defendant was informed either by his lawyers or in the state court proceedings of the charge against him. Henderson v. Morgan, 426 U.S. 637 (1976).

In the instant case, the state court found Hayes had been informed of the charge against him by receiving and reading the information (attached as Appendix "C").

In the habeas petition, Magistrate Burgess rephrased the question to whether the defendant understood the nature of the charge to which he pled.

The state courts had no opportunity to rule on this substantially different question and should have the right to do so. Picard v. Connor, 404 U.S. 770 (1971).

The evidence presented during the evidentiary hearing must be weighed in favor of a finding of information and the

conviction. Sumner v. Mata, 449 U.S. 539 (1981). The record showed that an unintelligent defendant may not be adequately apprised of the element of intent by merely reading the information, this defendant was neither unintelligent nor unsophisticated in legal matters. In 1976, the defendant stood trial for murder in the first degree and assault with intent to kill in Missouri. Defense counsel, Mr. O'Connell, described him as one of the most intelligent clients he had ever had and indicated to the court that he had seen Mr. Hayes approximately 15 times prior to the entry of the plea. In his testimony in federal court, attorney O'Connell also indicated that he had discussed with the defendant the reduction from a murder in the first degree to a murder in the second degree charge and had a specific recollection of a conversation with him regarding the

lack of premeditation between those two charges. Premeditation is the only element present in murder in the first degree but not present in murder in the second degree as filed.

Clearly the record supports only the finding that the defendant was informed and received notice of what he was being asked to admit. The fact that he refused to admit that the killings were intentional, though not planned, in the face of irrefutable evidence of intent -- multiple bullet wounds, second killing execution style while victim was laying on the ground -- does not render the plea voidable. North Carolina v. Alford, 400 U.S. 25 (1970).

The defendant's plea was constitutional. The Ninth Circuit erred by reviewing the matter de novo weighing all inferences in favor of petitioner and by failing to give any weight to the

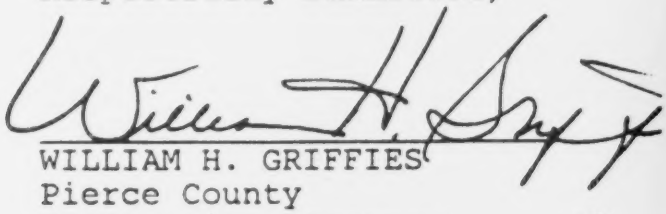
state court finding or remanding the matter to state court for a hearing and entry of findings.

CONCLUSION

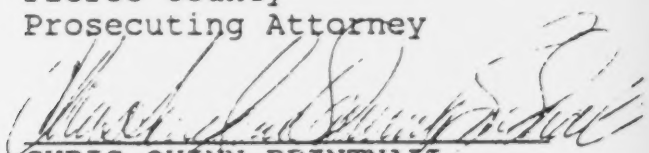
For the reasons stated above, a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should issue.

DATED this 16th day of May, 1986.

Respectfully submitted,



WILLIAM H. GRIFFIES
Pierce County
Prosecuting Attorney



CHRIS QUINN-BRINTNALL
Senior Appellate Deputy

CQB/g

FILED March 19, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK HAYES,	)	
	)	
Petitioner/ Appellee,	)	C.A. No. 85-3681
v.	)	D.C. No. CV-83-350-T
LARRY KINCHELOE,	)	
	)	OPINION
Respondent/ Appellant.	)	

On Appeal From the
United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted November 5, 1985
Seattle, Washington

Before: WRIGHT, REINHARDT and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

The State of Washington appeals the district court's order granting Mark Hayes' petition for a writ of habeas corpus on the basis that Hayes' guilty plea was involuntary. We affirm.

FACTS

On the evening of January 24, 1989, Hayes shot and killed Larry Jackson and Audrey Ellis outside a bar in Tacoma, Washington. Earlier in the evening, Hayes' acquaintance, Terrell Campbell, became involved in a quarrel with the two victims. Campbell left the bar and returned with Hayes and Hayes' girlfriend, Judy Wilson. The quarrel with the victims resumed outside the bar. Hayes went to his car, obtained a handgun, and eventually shot the victims. The record is ambiguous as to whether the shooting was deliberate and intentional or was accidental or was in self defense. Hayes pleaded guilty to two counts of second degree murder and was sentenced to two concurrent life terms.

Hayes later sought post conviction relief by filing a personal restraint petition in the Washington Court of Appeals. Hayes contended that his plea

was not made knowingly and intelligently. Specifically, Hayes argued that he was unaware that intent was a necessary element of second degree murder. Hayes stated that at the time of his arraignment he thought that he was pleading guilty to a strict liability office, and would not have pleaded guilty had he known the state was required to prove intent.

The Washington Court of Appeals reviewed the record and denied relief. The court stated:

> The record shows that petitioner received a copy of the amended information informing him of the elements of the crime. The Statement of Defendant on Plea of Guilty states that no undisclosed promises were made to him; such a statement should be accepted at face value. In re Keene, [95 Wash.2d 203, 622 P.2d 360] (1980). The factual basis for the plea was established both by petitioner's own statement and by the deputy prosecutor's recitation at the plea hearing, which established intent to kill. This is sufficient. See, State v. Newton, [87 Wash.2d 363, 552 P.2d 682] (1976).

Hayes then filed a petition for discretionary review with the Supreme

Court of Washington. The court denied the petition, stating:

> The record . . . discloses a sufficient basis for a finding of the requisite intent, even though petitioner's version of the offense does not of itself describe his intent. For example, among the facts recited by the prosecutor was that the victims had each been shot several times. To the extent that petitioner's real contention is that he was not properly informed of the intent element, the claim must still fail. He acknowledged that he had received a copy of the information, which set forth the intent element of the crime. Intent was also the subject of discussion at the hearing at which the plea was taken.
>
> In short, the record here does not contain the degree of confusion and uncertainty which this court recently found to require a remand for further inquiry into the facts of the plea-taking. In re Hews, [99 Wash.2d 80, 88, 660 P.2d 263] (1983). Rather, a fair reading of the record as a whole shows that petitioner's plea was constitutionally voluntary, based on an adequate understanding of the nature of the charge and having an adequate factual basis. Id. at 92.

Hayes then filed a petition for writ of habeas corpus in the United States District Court for the Western District of Washington. The district court referred

the matter to a magistrate, who reviewed the record of state proceedings and decided that an evidentiary hearing was required. The magistrate took Hayes' testimony and accepted a deposition of John J. O'Connell, Hayes' former counsel. The magistrate found that Hayes' guilty plea was not voluntarily made since Hayes did not receive actual notice of the true nature of the charge against him, or possess an understanding of the law in relation to the facts. The magistrate therefore recommended that the court issue the writ of habeas corpus unless the state allowed Hayes to withdraw his plea. The district court adopted the magistrate's findings and conclusions and eventually issued the writ. The state appeals.

STANDARD OF REVIEW

In the past, we reviewed a district court's findings as to voluntariness of a guilty plea under the clearly erroneous standard of review. Stone v. Cardwell,

620 F.2d 212, 213 (9th Cir. 1980). The Supreme Court's decision in Marshall v. Lonberger, 459 U.S. 422 (1983), and our decision in United States v. McConney, 728 F.2d 1195 (19th Cir.) (en banc), cert. denied, 105 S.Ct. 101 (1984), mandate rejection of the standard of review expressed in Stone v. Cardwell.

In Marshall, the Supreme Court stated that the requirements of 28 U.S.C. Sec. 2254(d) do not apply in determining whether a plea was voluntary because "the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law and not a question of fact ..." 459 U.S. at 431 (citations omitted). The Court distinguished questions of historical fact, and inferences drawn from those facts, which clearly are subject to the presumption of correctness afforded state court findings of fact by 28 U.S.C. Sec. 2254(d). Id.; see, Diaz v. Martin,

718 F.2d 1372, 1376 (5th Cir. 1983); Nash v. Israel, 707 F.2d 298, 301 (7th Cir. 1983).

Although the Supreme Court in Marshall focused solely on the standard of review of the state court decisions by a federal court, the Court's reasoning applies with equal vigor to our review of district court findings. A question of law in the eyes of the district court remains a question of law in the eyes of an appellate court. Moreover, even if the voluntariness of a guilty plea were considered a mixed question of law and fact, our en banc decision in United States v. McConney would require de novo review. We generally review mixed questions de novo, especially when constitutional rights are involved. McConney, 728 F.2d at 1204.

Therefore, we review the district court's determination as to the

voluntariness of the guilty plea de novo.[1] We will uphold the district court's finding of historical or subsidiary facts unless those findings are clearly erroneous, but we reserve the right to give different legal weight to such facts. See, Sumner v. Mata, 455 U.S. 591, 597 (1982) (per curiam); Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985).

EXHAUSTION OF STATE REMEDIES

At oral argument, we asked counsel to discuss whether Hayes could have pursued relief under any other Washington procedural rules. In response, counsel for the state directed our attention to Washington Civil Rule 60(b) and Washington Criminal Rule 7.6. We hold that Hayes' pursuit of relief by means of a personal restraint petition and a petition for discretionary review sufficiently

---

[1] We therefore decide the question that we left open in Williams v. Raines, No. 85-1619, slip op. at 4 (9th Cir. February 28, 1986).

exhausted his state remedies.

The exhaustion requirement is a matter of comity, not jurisdiction. Lindquist v. Gardner, 770 F.2d 876, 877 n.1 (9th Cir. 1985). Our concern for comity between state and federal courts is satisfied if "the petitioner's federal claim has been 'fairly presented to the state courts.'" Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971). If a petitioner presents his claim to the highest state court and that court disposes of the claim on the merits, the exhaustion requirement has been satisfied. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982); Batchelor v. Cupp, 693 F.2d 859, 863 (9th Cir. 1982), cert. denied, 463 U.S. 1212 (1983); Carothers v. Rhay, 594 F.2d at 228. Hayes presented his claim by means of a personal restraint petition to the Washington Court of Appeals and the Supreme Court of

Washington. Both courts rejected the claim on its merits. Hayes, therefore, exhausted his state remedies.[2]

PRESUMPTION OF CORRECTNESS OF STATE COURT FINDINGS

Generally, a federal court in a habeas corpus proceeding must accord a presumption of correctness to a state court's factual findings. 28 U.S.C. Sec. 2254(d). The presumption of correctness adheres to appellate, as well as trial court determinations of fact. Sumner v. Mata, 455 U.S. at 592-93. The presumption of correctness does not apply to a state court's determination of legal questions or mixed questions of fact and law. Id. at 597; Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); Pierre v. Thompson, 666 F.2d 424, 427 (9th Cir. 1982). The presumption of correctness also does not apply when

---

[2] Since Hayes exhausted his state remedies, we need not consider the effect of the state's earlier concession of exhaustion. Cf. Batchelor v. Cupp, 693 F.2d at 862-64.

one of the exceptions listed in 28 U.S.C. Sec. 2254(d) exists.

The decisions of the Washington courts that considered Hayes' personal restraint petition primarily reflect legal conclusions to which the presumption of correctness does not apply. To the extent the state court decisions reflect the factual finding that Hayes understood the nature of the charges against him, the decisions are not supported by the record upon which they are based.

The discussions of intent during the arraignment do not support the state court's conclusion that Hayes understood the elements of second degree murder. The superior court judge did not recite the elements of the crime of second degree murder to Hayes at any time during the arraignment. At one point, the prosecutor explained to the judge why the charge of second degree murder was appropriate:

> **MR. CONNELLY** [the prosecutor]: I think because of the fact that it seemed to be -- after all the facts were gathered up by the police, while it was an intentional shooting, the circumstances are such that lack of premeditation on the part of Hayes that one expects to find under our new code. And likewise, the involvement of Campbell in this.
>
> Well, he did go back and get Hayes. There is not proof that he knew or anticipated that Hayes was going to shoot.
>
> **THE COURT:** I take it Campbell did not pull the trigger?
>
> **MR. CONNELLY:** Campbell did not, and that is the reason from [sic] the charge from first degree.
>
> **THE COURT:** I will accept the amended information in all respects. If you have your clients come forward with you, we can proceed with the acceptance of the pleas.

The record of this exchange is insufficient in three respects to support a finding that Hayes knew that intent was an element of second degree murder. First, the court's instruction to have the "clients come forward" suggest that Hayes was out of earshot. Perhaps he heard the discussion, but this is not apparent from

the record. Second, the prosecutor's statements are not clear or direct. A person who is not aware of the fine distinction between the legal terms of art, "premeditated," and "intentional," might have understood the prosecutor to be saying that while the police gathered facts that indicated an intentional killing, the facts were insufficient under the new code. Third, there is no reason to assume that Hayes should have been alerted to the necessary elements of the crime by the arguments of his adversary, the prosecutor.

Moreover, at the arraignment, both the prosecutor and the judge expressed significant confusion regarding the intent required for second degree murder. The following exchange between the court and the prosecutor shows that the discussions during the arraignment could not have informed Hayes fairly of the intent requirement of second degree murder:

THE COURT: Okay. What particular intent is required on second degree, Mr. Connelly?

MR. CONNELLY: Well, during the assault according to Mr. Hayes's statement, your Honor.

THE COURT: You feel it would be felony murder, you don't need to get in any particular intent?

MR. CONNELLY: That's correct. The fact of the matter is both these people were shot twice, one after the other.

In his plea form describing the crime, Hayes wrote: ". . . I went and got the gun, to scare him. Pookie and the girl started fighting and the big guy grabbed me and we started fight [sic] over the gun. The gun fired. It was all mixed up. I don't remember to [sic] much else until later."

This confusion over the intent required for second degree murder continued into the sentencing. Hayes said: "[T]he crime that was committed by me was not deliberate crime . . . . If I hadn't of maybe struggled with the guy,

then maybe no one would have got [sic] shot or anything." The judge's comments indicate that Hayes' crime may not have been intentional: "Mr. Hayes' statement and perhaps the statements of everyone else would indicate serious doubt about whether anybody intended for anybody to get killed. I have trouble believing that anybody intended that somebody get killed in this."

Our examination of the record leads us to the conclusion that the record does not support the decisions of the state courts. Under 28 U.S.C. Sec. 2254(d)(8), the state court factual findings are not entitled to a presumption of correctness. The magistrate, therefore, properly decided to accept additional evidence and render independent findings.

VOLUNTARINESS OF GUILTY PLEA

Having considered the record, the deposition of Hayes' attorney, and Hayes' own testimony, the magistrate found that

Hayes successfully rebutted the presumption that his attorney explained the element of intent to Hayes, that intent is a critical element of the charge of second degree murder, and that Hayes' "plea of guilty was not voluntarily made since he did not receive real notice of the true nature of the charge against him, or possess an understanding of the law in relation to the facts."[3]

---

[3] The magistrate specifically found that:

> The deposition of Hayes' defense attorney reveals a number of things. His attorney stated that he visited with Hayes in jail, over a dozen times, and that these visits were "substantial" visits. He found Hayes extremely intelligent, quite familiar with the aspects of criminal trials and the general things that had to be proven or shown. He recalled that he was of the opinion the state could prove first degree murder without much difficulty. He reached this conclusion relying primarily on the facts as stated in the police report. He recalls being surprised that he was able to negotiate a plea to second degree murder. He also recalls, however, that any conversation with Hayes regarding Hayes' side of the story was minimal. He stated "the reason for that is that if we went to trial, and [Hayes] had stated

certain things to me different than what occurred at the trial, it would cause me difficulty in representing him. So my conversations with Mark as to the actual events as he would state them were very very marginal, not much at all." (Deposition p.12-13). At the time of the deposition, he had no recollection of sitting down and explaining the charge of second degree murder with Hayes but that that [sic] would be his "normal procedure". At several points in the deposition he stated the whole thrust of the defense in the latter stages was to persuade the prosecution to reduce the charge to second degree murder. At another point in the deposition he stated, "I don't recall discussing the specifics of second degree murder statues with Mark. I don't really recall any conversation discussing that. I know we discussed the difference between first and second degree murder with reference to premeditation." (Deposition p.11-12). Hayes' defense attorney was of the opinion that Hayes understood the crime to which he plead guilty, "because that was the amended information, the way it was amended, and that it what I anticipated it to be amended to." (Deposition p. 13). He stated "the matter was thoroughly discussed on a number of occasions to obtain some sort of favorable plea bargain." (Deposition p.16).

At the evidentiary hearing Hayes testified that his attorney never explained the elements of second degree murder to him and, specifically, that he did not explain that he was charged with an intentional killing in the Amended Information. Hayes testified that his defense attorney never

Because the record fails to disclose that the superior court judge explained the elements to Hayes the crucial factual question is whether Hayes' attorney explained to Hayes the elements of second degree murder. The state argues that Hayes' counsel was an experienced criminal attorney and made a practice of explaining the elements to his clients. The attorney's regular practice might support

---

asked him how the shootings occurred. Hayes said he plead guilty because he did not want both he and his fiance to go to jail since his fiance, Judy Wilson, had just given birth to a child he had fathered. He stated his attorney never went over the amended complaint with him. Hayes stated that at the time he plead guilty he had no understanding of the element of intent and that he would never have plead guilty had he known he was pleading to an intentional killing. He stated that trial tactics were never discussed. He stated he understood that premeditation was not an element of the crime to which he plead guilty.

On cross examination Hayes said that he did not recall the prosecutor reciting the facts that were being relied upon by the state. He stated that he did read the Amended Information but he did not understand it.

a finding that he explained the elements of second degree murder to Hayes. The attorney's habits, however, are not conclusive. The magistrate had before him Hayes' own testimony, which directly controverted the state's assertions. The magistrate obviously found Hayes credible. Based on the record in this case, we cannot say that the magistrate's conclusions of historical fact were clearly erroneous.

Alternatively, the superior court judge could have established on the record that Hayes understood the elements of second degree murder and that his conduct was sufficient to constitute the offense charged. See Nash, 707 F.2d at 301-02. Cf. Williams v. Raines, No. 85-1619, slip op. at 4 (9th Cir. February 28, 1986) (rejecting claim of involuntary guilty plea because trial court asked defendant whether he understood specific element of offense in question); Chua Han Mow v.

United States, 730 F.2d 1308, 1310 (9th Cir. 1984) (rejecting claim of involuntary guilty plea because record conclusively showed that guilty plea was voluntary), cert. denied, 105 S.Ct. 1403 (1985); see also, United States v. Diaz, 733 F.2d 371, 374 (5th Cir. 1984) (rule 11 hearing revealed extensive questioning which assured voluntariness of guilty plea); Smith v. Estelle, 711 F.2d 677, 680-81 (5th Cir. 1983) (record demonstrated voluntariness), cert. denied sub nom. Smith v. McKaskle, 104 S.Ct. 1685 (1984). The judge, prosecutor, and Hayes' attorney failed to inform him of the elements of second degree murder.[4] Hayes' guilty plea

---

[4] Because neither the judge, prosecutor, nor Hayes' attorney informed Hayes of the elements of second degree murder, wee need not decide whether a state court judge has an unequivocal duty to establish on the record that a pleading defendant understands the elements of the charge. Compare Nash, 707 F.2d at 301-02, (judge has duty to establish on record that defendant understands elements of charge) with Sober v. Crist, 644 F.2d 807, 809-10 (9th Cir. 1981) (per curiam)

was involuntary because he did not possess an understanding of "the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466 (1969); Sober v. Crist, 644 F.2d 807, 809 (9th Cir. 1981) (per curiam).

We therefore affirm the judgment of the district court.

AFFIRMED.

(either trial record must show that charge was explained or it must be shown that defense counsel explained elements of charge).

IN THE COURT OF APPEALS OF THE STATE OF

WASHINGTON

DIVISION TWO

In Re the Matter of: MARK HAYES,	)	PERSONAL RESTRAINT PETITION
Petitioner,	)	NO. _____
vs.	)	FILED: _____
STATE OF WASHINGTON,	)	
Respondent.	)	

A. STATUS OF PETITIONER

I, MARK HAYES, #270026, P.O. Box 520, Walla Walla, WA., apply for relief from confinement. I am now in custody serving sentence upon conviction of crime.

1. The court in which I was sentenced is the SUPERIOR COURT of the STATE OF WASHINGTON, County of PIERCE, City of TACOMA, WA.

2. I was convicted of two (2) counts of SECOND DEGREE MURDER, a violation of RCW 9A.32.050(1)(a), and a special finding was

entered that I was armed with a firearm during the commission of the offenses in accord with RCW 9.41.025.

3. My conviction was upon a plea of GUILTY entered on MARCH 26, 1980. Sentence of LIFE IMPRISONMENT was imposed on both counts by the HON. JUDGE WALDO F. STONE on JUNE 5, 1980.

4. My lawyer at trial was Att. JOHN J. O'CONNELL., Esq., whose address at the time of my conviction was 218 Tacoma Avenue South, Tacoma, WA., (98402).

5. I did not appeal from the decision of the trial court, as the Statement On Plea of Guilty stated that an appeal could not be taken, and I was unknowledgeable of my rights according to law, entering the plea of guilty upon improper advice of my counsel.

6 Since my conviction I have not asked a court for any relief from my conviction and

sentence other than I have already written above.

B. GROUNDS FOR RELIEF:

I claim FOUR grounds for relief, and attach each ground on separate sheets.

FIRST GROUND

1. My conviction should be vitiated and I should be granted a new trial because my GUILTY PLEA WAS UNINTELLIGENT AND COERCED, and a "factual basis" for the charges was non-existent.

2. The following facts are important when considering my case:

SUPPORTING FACTS: I was charged with two counts of Murder in the First Degree. The prosecution agreed to reduce the charges to Murder in the Second Degree and dismiss the charges against my financee (sic) if I pled guilty to the reduced charges.

Although it was clear from the record that the homicides occured (sic) during a

fray at which time I acted in self-defense and the second victim was accidentally shot, the court permitted me to enter a guilty plea without a showing of the requisite "intent" which is a "critical element" of the charges. My "Statement on Plea of Guilty" does not support a finding of guilt to the charges, and there was no "factual basis" therefor.

3. The following reported court decisions in cases similar to mine show the error I believe happened in my case:

McCARTHY V. UNITED STATES, 394 US 459, 22 L.Ed.2d 418, 89 S.Ct. 1166;
NORTH CAROLINA V. ALFORD, 400 US 25, 27 L.Ed.2d 162, 91 S.Ct. 160;
STATE V. IREDALE, 16 Wn.App. 53, 553 P.2d 1112;
IN RE WOODS V. RHAY, 68 Wn.2d 601, 414 P.2d 601.

4. The following statutes and constitutional provisions should be considered by the court:

Cr.R. 4.2(d); the Fifth & Fourteenth Amendments to the United States Constitution.

SECOND GROUND

1. My conviction should be vitiated and I should be released from confinement because the evidence was insufficient to support the charges of Second Degree Murder beyond a reasonable doubt.

2. The following facts are important when considering my case:

SUPPORTING FACTS: A charge of Second Degree Murder is sustained only when there has been an "intentional" homicide. The record is absent of any evidence showing the homicides to be "intentional" acts, and the judge who accepted the plea of guilty asserted that such evidence was lacking. My "Statement on Plea of Guilty" stated that the firing of the gun was accidental, and the discharge was made during a struggle. Absent the element of intent, I should not have been adjudged guilty of Second Degree Murder.

3. The following reported court decisions in cases similar to mine show the error I believe happened in my case:

STATE V. COLWASH, 15 Wash.App. 530, 550 P.2d 57;
STATE V. SILL, 57 Wn.2d 647, 289 P.2d 720;
STATE V. BURT, 94 Wn.2d 108, 614 P.2d 654;
IN RE WINSHIP, 357 US 358, 25 L.Ed.2d 368, 90 S.Ct. 1068;
JACKSON V. VIRGINIA, 443 US 307, 61 L.Ed.2d 560, 99 S.Ct. 2781

4. The following statutes and constitutional provisions should be considered by the Court:

RCW 10.58.020; the Fifth and Fourteenth Amendments to the United States Constitution.

THIRD GROUND

1. One of my sentences should be vacated because the prohibition against "double jeopardy" was violated when I was sentenced on two charges arising out of a "single transaction" which required the same proof.

2. The following facts are important when considering my case:

SUPPORTING FACTS: During a melee the unintentional firing of a gun resulted in the death of two persons, and consequently I was charged with two counts of First Degree Murder. I subsequently was coerced into entering pleas of guilty to two counts of Second Degree Murder, and was sentenced to life imprisonment on both counts.

3. The following reported court decisions in cases similar to mine who the error I believe happened in my case:

BELL V. UNITED STATES, 349 US 81, 75 S.Ct. 620, 99 L.Ed. 905;
LADNER V. UNITED STATES, 358 US 169, 3 L.Ed 2d 199, 79 S.Ct. 209.

4. The following statutes and constitutional provisions should be considered by the court:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

FOURTH GROUND

1. My conviction should be vitiated and I should be released from confinement because I was not provided "effective assistance of counsel."

2. The following facts are important when considering my case:

SUPPORTING FACTS: Counsel ill advised me as to the elements of the offenses to which my plea was entered, failed to challenge the insufficiency of the evidence to support the conviction, and failed to except to the multiple sentences imposed which flowed from a single transaction.

3. The following reported court decisions in cases similar to mine show the error I believe happened in my case:

PASSMORE v. ESTELLE, 594 F.2d 115;

STATE V. KENNEDY, 8 Wn.App. 633, 508 P.2d 1386.

4. The following statutes and constitutional provisions should be considered by the court:
The Sixth and Fourteenth Amendments to the Constitution of the United States.

5. This petition is the best way I know to get the relief I want, and no other way will work as well because:

This is the only vehicle presently available to me by which these manifest injustices can be corrected.

C. STATEMENT OF FINANCES

1. I ask the court to file this without making me pay the $25.00 filing fee because I am so poor I cannot pay the fee.

2. I have _____ in my prison or institution account.

3. I ask the court to appoint a lawyer for me because I am so poor I cannot afford to pay a lawyer.

4. I am not employed.

5. During the past 12 months I did not get any money from a business, profession or other form of self employment.

6. During the past 12 months, I did not get any rent payments.

During the past 12 months, I did not get any interests.

During the past 12 months, I did not get any dividends.

During the past 12 months, I did not get any other money.

7. During the past 12 months I did not have any cash except as said in answer 2.

During the past 12 months I did not have any savings accounts or checking accounts.

During the past 12 months I did not own stocks, bonds, or notes.

8. I do not have any real estate, property, or any thing of value.

9. I am married.

10. There are 6 person(s) who needs me to support them.

11. There are no bills that I owe.

D. REQUEST FOR RELIEF

I want this court to:

(a) Vacate my conviction and dismiss the criminal charges against me without a new trial.

(b) Order my release on personal recognizance in accord with RAP 15.16(b) until this petition is determined.

(c) Provide any and all relief that is appropriate and just.

F. OATH OF PETITIONER

STATE OF WASHINGTON)
SS.
COUNTY OF WALLA WALLA)

"I, MARK HAYES, after being first duly sworn on oath, deposes and says:

That I am the petitioner, that I have read the petition, know its contents, and I believe the petition to be true to the best of my knowledge and belief."

s/_____
Mark Hayes, #270026
P.O. Box 520, 4-Wing
Walla Walla, WA 99362

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1982.

_____
Notary Public in and for the
State of Washington, residing at
Walla Walla County.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff,	)	NO. 5 6 7 6 8
vs.	)	AMENDED INFORMATION
MARK ANDREW HAYES and TARRELL THERON CAMPBELL, Defendants.	)	

Comes now DON HERRON Prosecuting Attorney in and for the County of Pierce, State of Washington, and by this amended information accuses MARK ANDREW HAYES of the crime of MURDER IN THE SECOND DEGREE RCW 9A.32.050(1)(a) committed as follows, to-wit:

That the said MARK ANDREW HAYES in the County of Pierce, in the State of Washington, on or about the 24th day of January, 1980, did then and there being unlawfully and feloniously with intent to cause the death of another person, did shoot Audrey Lucille Ellis, a human being, thereby causing the death of Audrey Lucille Ellis, on or

Appendix "C"

about January 24, 1980, said defendant being armed with a firearm and invoking the provisions of RCW 9.41.025, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington.

COUNT II

And for a Second Count and further cause of action, the same being of the same class of crime and a part of the same transaction as that set forth in Count I hereof, comes now DON HERRON Prosecuting Attorney in and for the County of Pierce, State of Washington, and by this amended information accuses MARK ANDREW HAYES of the crime of MURDER IN THE SECOND DEGREE RCW 9A.32.050(1)(a) committed as follows, to-wit:

That the said MARK ANDREW HAYES in the County of Pierce, in the State of Washington, on or about the 24th day of January, 1980, did then and there being unlawfully and feloniously with intent to cause the death of another person, did shoot Larry

ENTERED: FEB 4 1985

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAK HAYES, Petitioner; v. LARRY KINCHELOE, Respondent.	NO. C83-350T REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This matter has been referred to United States Magistrate Franklin D. Burgess pursuant to 28 U.S.C. Sec. 636(b)(1)(B) and local Magistrates Rule MR4.

Petitioner, Mark Hayes, has filed a

recklessly cause the death of Audrey Lucille Ellis, a human being, on or about January 24, 1980, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington.

COUNT IV

And for a Fourth Count and further cause of action, the same being of the same class of crime and a part of the same transaction as that set forth in Counts I, II, and III hereof, comes now DON HERRON Prosecuting Attorney in and for the County of Pierce, State of Washington, and by this amended information accuses TARRELL THERON CAMPBELL of the crime of MANSLAUGHTER IN THE FIRST DEGREE RCW 9A.32.060(1)(a) committed as follows, to-wit:

That the said TARRELL THERON CAMPBELL in the County of Pierce, in the State of Washington, on or about the 24th day of January, 1980, did then and there being unlawfully and feloniously

Appendix "C"

Travis Jackson, a human being, thereby causing the death of Larry Travis Jackson, on or about January 24, 1980, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington.

COUNT III

And for a Third Count and further cause of action, the same being of the same class of crime and a part of the same transaction as that set forth in Counts I and II hereof, comes now DON HERRON Prosecuting Attorney in and for the County of Pierce, State of Washington, and by this amended information accuses TARRELL THERON CAMPBELL of the crime of MANSLAUGHTER IN THE FIRST DEGREE RCW 9A.32.060(1)(a) committed as follows, to-wit:

That the said TARRELL THERON CAMPBELL in the County of Pierce, in the State of Washington, on or about the 24th day of January, 1980, did then and there being unlawfully and feloniously

recklessly cause the death of Larry Travis Jackson, a human being, on or about January 24, 1980, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington.

DATED this 26th day of March, 1980.

DON HERRON
Prosecuting Attorney in and for said County and State.

By: _____
ELLSWORTH I. CONNELLY,
Deputy

Appendix "C"

RECEIVED: FEB 06 1985
ATTORNEY GENERAL'S DIVISION
DEPARTMENT OF CORRECTIONS

LODGED: JAN 15 1985
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FILED: FEB 4 1984 [sic]
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ENTERED: FEB 4 1985

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARK HAYES, Petitioner, v. LARRY KINCHELOE, Respondent.	)	NO. C83-350T O R D E R

Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254, and the matter has been referred to the United States Magistrate

Appendix "D"

who has made a Report and Recommendation in this matter.

After reviewing the file herein and the Report and Recommendation of the Magistrate, it is hereby

ORDERED:

1. The Report and Recommendation of the Magistrate is hereby approved and adopted by this court.

2. That within 60 days from entry of this order that the State of Washington allow petitioner to withdraw his plea of guilty and that if such an opportunity is not given petitioner then the writ shall issue.

3. The Clerk of the Court shall direct copies of this Order to counsel for petitioner (if any, otherwise to

responsible.

DATED this 4th day of February, 1985.

/s/ Jack E. Tanner
UNITED STATES
DISTRICT JUDGE

Appendix "D"

Petition for Writ of Habeas Corpus under 28 U.S.C. Sec. 2254. He is presently incarcerated by the state of Washington following his guilty plea to two counts of Second Degree Murder in violation of RCW 9A.32.050(1)(a). Generally, Hayes argues the writ should issue since his plea of guilty was not knowingly, intelligently, or voluntarily made in violation of the due process clause of the 14th Amendment because he did not understand nor was it ever explained to him by either the court or his counsel that a plea of second degree murder amounted to an admission of guilty to an intentional killing.

Hayes was initially charged with two counts of first degree murder. The killings took place on January 24, 1980 outside a bar. Accompanying Hayes on the evening of the killings, were Terrance Campbell and Mr. Hayes' girlfriend, Judy

Appendix "E"

Wilson.

Earlier in the evening, Campbell became involved in a quarrel with the two victims. Apparently, this quarrel did not amount to much and Campbell then left the tavern. After he left the tavern he drove to the home of Mr. Hayes. After some period of time, Hayes, his girlfriend, and Campbell returned to the tavern. Hayes and Campbell got out of the car and the confrontation with the victims again flared up. This time, rather than a low key argument, the confrontation intensified. At some point, Hayes withdrew from the area of confrontation, went back to the car, got a handgun which he had brought with him, and returned to the are of the confrontation. Shortly thereafter, Hayes shot two people who later died.

The precise circumstances of the

Appendix "E"

sitting down and explaining the charge of second degree murder with Hayes but that that would be his "normal procedure". At several points in the deposition he stated *the whole thrust of the defense in the latter stages was to persuade the prosecution to reduce the charge to second degree murder. At another point in the deposition he stated, "I don't recall discussing the specifics of second degree* murder statute with Mark. I don't really recall any conversation discussing that. I know we discussed the difference between first and second degree murder with reference to premeditation." (Deposition p. 11-12). Hayes' defense attorney was of the opinion that Hayes understood the crime to which he plead guilty, "because that was the amended information, the way it was amended, and that is what I anticipated to be amended to."

that had to be proven or shown. He recalled that he was of the opinion the state could prove first degree murder without much difficulty. He reached this conclusion relying primarily on the facts as stated in the police report. He recalls being surprised that he was able to negotiate a plea to second degree murder. He also recalls, however, that any conversation with Hayes regarding Hayes' side of the story was minimal. He stated "the reason for that is that if we went to trial, and [Hayes] had stated certain things to me different than what occurred at the trial, it would cause me difficulty in representing him. So my conversations with mark as to the actual events as he would state them were very very marginal, not much at all." (Deposition p. 12-13). At the time of the deposition, he had no recollection of

Appendix "E"

shootings are not clear from the record. Some aspects of the record would indicate that the shooting, although not premeditated, was deliberate and intentional. Other aspects of the record indicate the shootings were accidental or in self defense due to the arguing and scuffling which was taking place. An exact resolution of the factual circumstances surrounding the shooting is not, however, necessary given the issue before the court.

Initially, Mark Hayes, Terrell Campbell and Judy Wilson, were each charged with first degree murder for the deaths of Audrey Ellis and Larry Jackson. An amended information was filed on or about April 1, 1981 charging Hayes with two counts of second degree murder, Campbell with two counts of first degree manslaughter, and dropping the charges

Appendix "E"

against Judy Wilson. Hayes plead guilty to two counts of Second Degree Murder on April 3, 1980.

Hayes claims his plea of guilty was constitutionally invalid since he never received real or actual notice of the element of intent contained in a charge of second degree murder. In conjunction with this, plaintiff asserts that the element of intent is a critical element in a charge of second degree murder.

Factually, plaintiff claims the element of intent was never explained to him by the trial court or his attorney. This court has before it the trial record of Hayes' arraignment and sentencing, the deposition of Hayes' defense attorney and Hayes' testimony which was taken before this court at an evidentiary hearing.

When accepting Hayes' plea of guilty to the charge of second degree murder, the

Appendix "E"

trial court did not explain to him that intent to cause the death of another was an element of the crime charged. Moreover, at these proceedings, Hayes made no admission that he intended to cause the death of another human being. Hayes did not stipulate to the fact that he intended to cause the death of another human being nor did Hayes' attorney make such a stipulation. In fact, Hayes' account of the shooting to the court, if true, would not support a finding of guilt of a charge of second degree murder.

The deposition of Hayes' defense attorney reveals a number of things. His attorney stated that he visited with Hayes in jail, over a dozen times, and that these visits were "substantial" visits. He found Hayes extremely intelligent, quite familiar with the aspects of criminal trials and the general things

Appendix "E"

(Deposition p. 13). He stated "the matter was thoroughly discussed on a number of occasions to obtain some sort of favorable plea bargain." (Deposition p. 16).

At the evidentiary hearing Hayes testified that his attorney never explained the elements of second degree murder to him and, specifically, that he did not explain that he was charged with an intentional killing in the Amended Information. Hayes testified that his defense attorney never asked him how the shootings occurred. Hayes said he plead guilty because he did not want both he and his fiance to go to jail since his fiance, Judy Wilson, had just given birth to a child he had fathered. He stated his attorney never went over the amended complaint with him. Hayes states that at the time he plead guilty he had no understanding of the element of intent and

Appendix "E"

that he would never have plead guilty had he known he was pleading to an intentional killing. He stated that trial tactics were never discussed. He stated he understood that premeditation was not an element of the crime to which he plead guilty.

On cross examination Hayes said that he did not recall the prosecutor reciting the facts that were being relied upon by the state. He stated that he did read the amended information but he did not understand it.

At his sentencing, Hayes stated, "that the crime that was committed by me was not a deliberate crime . . ." He went on to say, "If I hadn't of maybe struggled with the guy, then maybe no one would have got shot or anything. I know that my pulling the gun out, bringing the gun out was wrong . . . ."

Appendix "E"

The court, in sentencing Mr. Hayes, stated, "certainly the charge of murder in the second degree and Mr. Hayes' statement and perhaps the statements of everyone else would indicate serious doubts as to whether anybody intended for anybody to get killed. I have trouble believing that anybody intended that somebody get killed in this. Yet Hayes deliberately sought out a confrontation or a drug rumble with a loaded weapon in his hand. Foreseeably, somebody getting killed is obvious."

A plea cannot support a judgment of guilt unless it was voluntarily made. Henderon v. Morgan, 426 U.S. 637, 645 (1975). A plea is not voluntary unless it is intelligently made. Id. For one's plea to be intelligent, the one must receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due

process. Smith v. O'Grady, 312 U.S. 329, 334 (1941). "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts," which entails an "understanding of the essential elements of the crime charged," Sober v. Crist, 644 F.2d 807, 809 (9th Cir. 1981), quoting McCarthy v. Untied States, 394 U.S. 459, 466 (1969). Finally, "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Henderson v. Morgan, 426 U.S. 637, 647 (1975).

Respondent argues that this court should look at the record as a whole, draw reasonable inferences therefrom, and reach

the conclusion that Hayes' plea was intelligently and voluntarily made. Respondent draws the court's attention to several factors in this regard. First, both the initial information charging first degree murder and the amended information charging second degree murder charge an intentional killing. The initial information states "With premeditated intent to cause the death of another person," Mark Andrew Hayes did shoot Audrey Lucille Ellis thereby causing the death of Audrey Lucille Ellis. Count II of the initial information similarly charges Hayes with the first degree murder of Larry Jackson. The amended information, to which Hayes plead guilty, states, in part, that Mark Andrew Hayes, "did then and there being lawfully and feloniously with intent to cause the death of another person, did shoot Audrey

Lucille Ellis, a human being, thereby causing the death of Audrey Lucille Ellis. . . ." In another count, Hayes was charged similarly concerning the death of Jackson. Respondent reasons, therefore, that petitioner received notice of the charge against him from the language of the informations lodged against him.

Secondly, respondent asserts plaintiff receive notice of the intent element in the charge by virtue of certain statements made by the prosecutor at petitioner's arraignment and sentencing. At certain points during these proceedings, the prosecutor noted that the shooting was an "intentional shooting" and also offered the following summary of events, "defendant Hayes shot Jackson twice in the head, first while Jackson was strugging [sic] with Campbell, and then went up and finished him off. Then he

walked over and killed Miss Ellis when she was essentially down and out."

Thirdly, respondent argues Hayes must have been informed of the element of intent by his defense counsel. Respondent notes that defense counsel has considerable experience and reputation in the state of Washington, that he found Hayes to be an extremely intelligent young man who had had prior experience with criminal law, and that his defense counsel testified through deposition that it was his normal procedure to discuss the information and the charges with his client in preparation for pleas or trials.

The issue to be decided is whether Mr. Hayes' plea of guilty was voluntarily made. He claims it was not since he was not informed that intent to cause the death of a human being was an element of the crime charged.

The proceedings in court at Hayes' arraignment and sentencing did not afford him "real notice of the true nature of the charges against him." Clearly, the trial record shows the sentencing court did not explain intent to petitioner. Equally clear, petitioner's attorney did not represent to the sentencing court that he had explained the element of intent to petitioner. Finally, this court is not satisfied that petitioner gained sufficient notice and understanding of the element of intent by virtue of the prosecutor's statements to the sentencing court.

Respondent relies on Richard v. Callahan, 723 F.2d 1028 (1st Cir. 1983) for the proposition that a criminal defendant cannot close his eyes and ears to the events around him and later claim his guilty plea was not voluntary. While,

under the circumstances of Richard, a habeas court might infer one received notice and an understanding of the charges against him from the court proceedings at which he was present, such is not the case in this matter. In Richard, the court inferred notice and understanding from court proceedings that included pretrial matters, opening argument at trial, twelve days of trial and testimony and the prosecution's closing argument. The court proceedings in this case do not rise to the level of Richard and, therefore, any inference of notice and understanding would not be justified. At petitioner's arraignment and sentencing, only on a few occasions, and then only briefly or summarily, was intent discussed or mentioned. These circumstances are far different from those relied upon by the Richard court. Moreover, petitioner

testified that he had no understanding of the intent element of second degree murder and that the prosecutor's remarks made no impression on him regarding intent. Finally, the trial court expressed serious doubts regarding petitioner's intent to kill anyone. Consequently, this court finds that petitioner did not receive fair notice of the element of intent for the court proceedings.

Respondent also relies upon McGuirk v. Fair, 622 F.2d 597 (1st Cir. 1980) for the proposition that a defendant can receive real and actual notice of the charge against him through extensive discussion with his defense attorney.

In McGuirk, the court found the petitioner was fairly appraised of the charge against him. The case at hand is distinguishable. The McGuirk court, quoting a finding of the District habeas

court, explained its holding as follows:

> Defense counsel's extended discussion with the petitioner about the difference between first and second degree murder, the chances for conviction of first degree murder, the possibility of a manslaughter plea and his analysis of the evidence and inferences which the jury could draw all combine to fairly appraise him of the crime to which he ultimately pleaded.
> McGuirk v. Fair, supra at 599.

Furthermore, the McGuirk court noted that conferences between defense counsel and defendant extended over a two month period which pleas to first and second degree murder and manslaughter were considered. Defense counsel did not want his client to plea to second degree murder.

The record in this case does not show or support a conclusion that the type of "extended discussion" described in McGuirk, took place between Hayes and his

Appendix "E"

defense counsel. Without question, Hayes met with his attorney at least a dozen times. The evidence regarding the substance and quality of these discussions is, however, sketchy and filled with generalities. This court concludes that the bulk of discussion between Hayes and his attorney involved negotiating a plea to second degree murder primarily involving Hayes' attorney's successful attempts to convince the prosecuting that premeditation could not be proved. It appears trial of Hayes case was never seriously considered. Under these circumstances, it is quite probable that intent was never discussed. Hayes testified he was never advised by his attorney a plea of second degree murder was an admission to an intentional killing. He also stated trial tactics were never discussed. There is no

evidence that defense strategy was discussed. Hayes' attorney could not specifically recall discussing the element of intent with Hayes. Hayes' version of the facts was only minimally discussed with his defense attorney. Hayes' attorney through Hayes understood the charge against him, not because he explained the charge to him or because Hayes made comments to him indicating notice and understanding but, rather, because the amended information was charging second degree murder and that is what he anticipated. At most, Hayes' attorney could only say that it was his usual practice to explain the charges against a client. Under these circumstances, it is quite probable intent was never discussed between Hayes and his attorney such that Hayes received real notice of the true nature of the charge of

second degree murder. Moreover, since Hayes' attorney only minimally discussed Hayes' version of the facts, this court concludes that Hayes could not have understood the law in relation to the facts including an awareness of possible defenses. See McCarthy v. United States, 394 U.S. 459, 466, 471 (1969); Sober v. Crist, 644 F.2d 807, 809, n.3 (9th Cir. 1981).

Finally, this court determines Hayes was not adequately informed of the element of intent by virtue of the language of the amended information to which he plead guilty. A charging document in a criminal matter is a highly technical one. To have an understanding and notice of the charge requires more than simply reading the information alone; especially for a layman. Even if the information provides real notice of the true nature of the

charge, it cannot possible provide one with an understanding of the law in relation to the facts including an awareness of possible defenses. See McCarthy v. United States, supra. Sober v. Crist, supra.

In sum, this court finds that petitioner has met and rebutted the presumption that his attorney explained the element of intent to him. Second, this court finds that the intent element in a charge of second degree murder is a critical element of that charge. Henderson v. Morgan, 426 U.S. 637 (1976). Third, this court finds petitioner's plea of guilty was not voluntarily made since he did not receive real notice of the true nature of the charge against him, or possess an understanding of the law in relation to the facts.

It is, therefore, the recommendation

of the Magistrate that within 60 days from the entry of the District Court's order that the state of Washington allow petitioner to withdraw his plea of guilty and that if such an opportunity is not given petitioner then the writ shall issue.

DATED this 14 day of Jan., 1985.

/s/ [Franklin D. Burgess
UNITED STATES MAGISTRATE

Department of Corrections
Attorney General's Division
MAY 14 1984

LODGED: APR 17 1984
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FILED: MAY 10 1984
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ENTERED: MAY 11 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARK HAYES,	)	
	)	
Petitioner,	)	NO. C83-350T
	)	
v.	)	
	)	O R D E R
LARRY KINCHELOE,	)	
	)	
Respondent.	)	
	)	

Petitioner has filed a Petition for

Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254, and the matter has been referred to the United States Magistrate who has made a Report and Recommendation in this matter.

After reviewing the file herein and the Report and Recommendation of the Magistrate, it is hereby

ORDERED:

1. The Report and Recommendation of the Magistrate is hereby approved and adopted by this court.

2. That respondent's Motion to Dismiss is Granted regarding petitioner's claims of double jeopardy, ineffective counsel, coerced guilty plea and insufficiency of evidence to support his conviction.

3. That respondent's Motion to Dismiss is denied regarding petitioner's claim that his guilty plea was not

knowingly, intelligently and voluntarily made.

4. The clerk shall forward copies of this order to petitioner and to the attorneys for respondent.

DATED this 10th day of May, 1984.

/s/ [Jack E. Tanner]
UNITED STATES DISTRICT JUDGE

Appendix "F"

FILED: MAY 10, 1984
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ENTERED: MAY 11, 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARK HAYES,	)	
	)	
Petitioner,	)	NO. C83-350T
	)	
v.	)	REPORT AND
	)	RECOMMENDATION
LARRY KINCHELOE,	)	OF UNITED STATES
	)	MAGISTRATE
Respondent.	)	
	)	

This matter has been referred to United States Magistrate Franklin D. Burgess pursuant to 28 U.S.C. Sec. 636 (b)(1)(B) and local Magistrates Rule MR4.

Petitioner, Mark Hayes, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254.

Appendix "G"

Petitioner plead guilty to two counts of second degree murder and received consecutive life sentences.

Petitioner claims he is entitled to habeas relief upon the following grounds: That his sentence violates the double jeopardy clause of the 5th Amendment, that he was denied effective assistance of counsel, that his guilty plea was unconstitutionally coerced, that there is insufficient evidence in the record to support a conviction of second degree murder and that his guilty plea was not knowingly and intelligently made.

Upon reviewing the record, the court determines that petitioner has exhausted his state remedies; the state is in agreement with this assessment.

The facts giving rise to petitioner's conviction will be briefly stated. Petitioner and two friends were involved

in an altercation outside a tavern in Pierce County, Washington. As the confrontation heated up, the petitioner went to his car which was parked nearby and got a gun. With the gun, he rejoined his friends. A scuffle then ensued and petitioner shot and killed two people.

Petitioner was initially charged by information with two counts of first degree murder. However, pursuant to a plea agreement, petitioner plead guilty to two counts of second degree murder.

Defendant has moved to dismiss Mr. Hayes' petition pursuant to Federal Rule of Civil Procedure 12(b)(6) claiming petitioner has failed to state a claim for relief.

In determining whether to dismiss a complaint for failure to state a claim, all material allegations in plaintiff's complaint are accepted as true and are

construed in the light most favorable to the plaintiff; Lodge 1380, Brotherhoc of Railway, Airline & Steamship Clerks v. Dennis, 625 F.2d 819, 825 (9th Cir. 1980). The allegation of a complaint prepared pro se are "however inartfully pleaded," held "to less stringent standards than formal pleadings drafted by lawyers. . . ." Haines v. Kerner, 404 U.S. 519, 520 (1972), and are not dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Hughes v. Rowe, 449 U.S. 5, 10 (1980).

Petitioner claims he was subjected to double jeopardy by being tried and sentenced upon two charges arising out of a single transaction. Plaintiff claims that since two people were shot and killed during the same altercation that he has

committed but a single offense.

The double jeopardy clause of the 5th Amendment bars multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161, 165 (1976). Clearly, petitioner was not subjected to double jeopardy since the prosecution would have been required to prove the killing of two individuals. Accordingly, two separate offenses were committed by petitioner. Blockburger v. Untied States, 284 U.S. 299, 304 (1932). As a result, this court finds that petitioner under no set of facts, has been subjected to double jeopardy.

Petitioner next claims he was denied effective assistance of counsel as guaranteed by the 6th Amendment. The 6th Amendment to the Constitution requires that a criminal defendant receive reasonably competent and effective representation. Cooper v. Fitzharris, 586

F.2d 1325, 1328 (9th Cir. 1978). (En banc, cert. denied 440 U.S. 974 (1979). In order to prevail on his claim, petitioner must demonstrate, 1) that his counsel made unreasonable errors or omissions that constitute ineffectiveness, and 2) prejudice to his defense due to these errors or omissions. United States v. Tucker, 716 F.2d 576, 586 (9th Cir. 1983).

In reviewing the record, this court finds that plaintiff has not stated a cause of action for ineffective assistance of counsel. Petitioner's objections involves strategy decisions made by his counsel and objections which might have been made by his counsel during the taking of his guilty plea. There are no facts to indicate petitioner's counsel was ineffective or that defendant was prejudiced by any act or omission. In

fact, the record indicates petitioner's counsel was extremely effective in that he was able to negotiate a plea whereby the charges against petitioner were reduced from first degree murder to second degree murder.

Plaintiff claims his guilty plea was coerced since the prosecution leveraged his guilty plea by offering to dismiss the charges filed against his "common law" wife. Petitioner's argument has no merit since the prosecution is entitled to use a charge upon a co-defendant as leverage in the plea bargaining process. See: Bordenkirscher v. Hayes, 434 U.S. 357 (1978).

Accordingly, it appears beyond doubt that plaintiff can prove no set of facts entitling him to relief.

Petitioner also argues that the record contains an insufficient factual

basis upon which to base his guilty plea. Even assuming such an argument raises a constitutional violation, there is no constitutional requirement that a state court establish a factual basis for a guilty plea before entering a judgment. See: Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975); Freeman v. Page, 443 F.2d 493 (10th Cir. 1971). Moreover, even though petitioner's guilty plea was unequivocal, the acceptance of such a plea does not violate due process. North Carolina v. Alford, 400 U.S. 25 (1970). Consequently, petitioner has failed to state a claim cognizable under 28 U.S.C. Sec. 2254.

Finally, petitioner claims his guilty plea was not knowingly and intelligently made since he was not advised by the court or his counsel of the legal effect of the element of intent which is a critical

element of the crime of second degree murder. The government asserts that petitioner was advised that intent is an element of second degree murder since intent is mentioned in the information and since the prosecutor referred to the element of intent at petitioner's arraignment.

In order for a guilty plea to be constitutionally valid, the plea must be knowingly, intelligently, and voluntarily made. Boykin v. Alabama, 395 U.S. 238 (1969). A plea is not made intelligently unless the defendant receives "real notice of the true nature of the charge against him." Smith v. O'Grady, 312 U.S. 329, 334 (1941). Similarly, before a criminal defendant's plea of guilty can be considered intelligently made, he must receive real notice of the true nature of the element of intent. Since intent is a

critical element of the offense of second degree murder. Henderson v. Morgan, 426 U.S. 637 (1975); Sober v. Crist, 644 F.2d 807 (9th Cir. 1981). Simply referring to the element of intent in the information charging petitioner or referring to that element at is [sic] his arraignment, does not satisfy this requirement. Sober v. Crist, supra. Consequently, plaintiff has stated a cause of action in this regard.

Based upon the foregoing, it is the recommendation of the Magistrate that defendant's motion to dismiss be granted regarding petitioner's claims of double jeopardy, ineffective counsel, coerced guilty plea and insufficiency of evidence to support his conviction. However, it is the recommendation of the Magistrate that defendant's Motion to Dismiss be denied regarding petitioner's claim that his guilty plea was not knowingly,

intelligently and voluntarily made.

DATED this 16 day of April, 1984.

/s/ [Franklin D. Burgess]
UNITED STATES MAGISTRATE